

Sampling – is it legal?

The effects of copyright on sample-based music

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<p>Abstract:</p> <p>The purpose of this bachelor's thesis was to study how the Finnish Copyright Act sees sample-based music. The thesis was written in English because the question is an international one, and Finnish Law has been made compatible to EU law. The thesis investigated what protection the Copyright Act grants to works and what rights it gives to authors. The thesis asked the following questions; how does the Copyright Act relate to sampling? When is it legal to sample? And is it possible ... and is it possible to circumvent the moral rights provided by copyright law? The final conclusions of this thesis were that sampling is difficult to defend by using copyright law, and that ethical and political arguments were the only ones the writer was able to use to argue for sampling. The goal of the thesis was not reached, nor was any compromise achieved. The music project that came with this thesis was deemed illegal, but it became a good example on what the problems are in copyright legislation in regard to sampling.</p>	
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<p>Sammandrag:</p> <p>Syftet till arbetet var att granska hur den finska upphovsrättslagen ser på samplebaserad musik. Arbetet skrevs på engelska eftersom frågan är internationell och finska lagarna har för det mesta synkroniserats med EU-lagstiftning. I examensarbetet granskades hurudant skydd Upphovsrättslagen ger åt musikaliska verk, och vilka rättigheter den ger upphovsägaren. Frågeställningarna i arbetet var: Under vilka omständigheter kan man sampla lagligt? Hur tillställer sig Upphovsrätten gentemot sampling? Finns det något sätt att kringgå de moraliska rättigheterna? Slutsatserna för arbetet blev att sampling trots allt är svårt att försvara med lagstiftning och att etiska och politiska argument är de enda man kan argumentera med i frågan om sampling. Ändamålet till examensarbetet nåddes inte, och en kompromiss var inte heller möjlig. Det musikprojekt som medkom med examensarbetet är olagligt men blev ett mycket bra exempel på vilka problemen med sampling är med tanke på upphovsrättslagen.</p>	
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FOREWORD

This thesis would never have been possible without the help and understanding of Arcada personnel. Naming names I would mostly thank Tuulikki Haaranen for her support, her extreme generosity of her time and help. I would also like to thank Tommy Mård for helping me out with prolonging my right to study at ARCADA when personal issues and health made it impossible to work.

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"... what is happening to our right to be inspired? How can I be inspired by somebody else's work, and build something new "on top of it", when I cannot even refer to, quote, or use a tiny sample of it? How can I take all this content that floats around me, that surrounds me everywhere, and not avail myself of any of it, in any way, until seventy-five years after the death of the author? Even the tiniest sample of someone else's work could get me in deep trouble."

(Kusek and Leonhard, 2005, p.46)

1 INTRODUCTION AND RESEARCH APPROACH

This bachelor thesis outlines the difficulties; practical, ethical and legal, one might face as a sampling artist. The problems that sampling artists face are intertwined with issues of ownership of regarding intellectual property, more specifically ownership of copyright.

In this text sampling is understood as the act of editing a bit of audio material and processing- and rearranging it into a new context and whole. In practice, sampling consists of re-recording existing material and storing it into the memory of a sampler to reproduce certain parts at will. Hardware- as well as modern software-samplers in digital audio workstations accomplish this function. The modern digital workstation also features plugins, which are effects and audio processors. Digital signal processing (DSP) is used to emulate the first samplers from the early 1980's and the sound of vinyl records.

A more creative way of sampling is using snippets (extremely short bits of sound) from a multitude of songs. For example, a song may hold an infinite amount of samples, the largest amount being 70.208 by a German musician named Johannes Kreidler (Kreidler, 2008). The piece by Kreidler is called Product Placement and it was published in 2008. The point to the creation of the work was to overwhelm GEMA, the German Society of Authors, by producing an insane amount of administrative work by playing with their requirements to file a paper per used sample in order to demonstrate how unreasonable registration requirements are when it comes to clearing rights (ibid.). Kreidler directed his criticism towards GEMA and its lack of Internet-based copyright clearance. However, even if given the possibility of Internet registration, it would amount to considerable bureaucracy for the artist. Kreidler demonstrates by his 33-second piece that the difficulties surrounding sampling are also practical.

Every right holder has to consent to the use of the piece he commands ownership in, in part or in whole. Therefore any copyright owner can thwart a sample-based project by not consenting or by over-pricing the license fee. Michael Heller (2008) speaks of too much ownership, leading to a property gridlock where a mutual agreement becomes impossible due to too many parties owning veto.

"It's pretty much impossible to clear samples now [in 2005]. We had to stay away from samples as much as possible. [...] Now it's prohibitively difficult and expensive to justify your one weird little horn blare that happens for half of a second one time in a song and makes you give away 70 percent of the song and \$50,000. That's where sampling has gone, and that's why hip hop sounds the way it does now." –Beck Hansen (in Fink, 2008, p.1)

Public Enemy is another example of a band, which seems to have decreased drastically the use of samples. While in the beginning of 90's the band published songs that had dozens of samples cut on top of each other forming a great texture of layered sound, now the newest album of Public Enemy includes no more than one or three samples. (Heller, 2008)

The decline of samples in new albums speaks of the increased interest in protecting the ownership rights of music, even for material that hasn't been heard since its publication over 40 years ago. Current restrictions restrict sampling artists from using our common musical history and culture in new works. The effects of increased protection might be a missed opportunity to the original authors, since sampling could be seen as way to educate new generations of music listeners to the work of previous generations or a way to revive a works popularity and profitability.

International law protects the rights of intellectual property owners, therefore keeping the music static and unchangeable by preserving music pieces in their original form and wholes. Sampling has challenged how we see music. Sampling has broken the myth of songs being perfect wholes. Even pieces considered classics degrade over time, lose their value and break down. (Forman and Neal, 2004) The technology that makes sampling possible has evolved into an everyday tool in the music business. However, there are obscurities related to sampling in the context of copyright law and sampling is not recognized in Finnish copyright law per se. The legal issues surrounding sampling are numerous because music recordings have many right holders.

Firstly, in a piece of audio material like music, for example, the producer of the audio recording has his own copyright that encompasses the recording itself. Secondly the composer and author hold their own copyright regarding the composition or “song”. Thirdly, the performer might hold moral rights to a recording. The current legislation in Finland allows one to use music freely only after 70 years has passed from the author’s death (Section 43, 1995/1654). Additionally the producer of the sound recording holds his rights 50 years from the date of the recording or publication (Section 46 [1], 2005/821).

The length of copyright protection creates a problem, since high quality recordings were made after the sixties, after the inception of vinyl records and high quality tape recorders. Since audio recording technology of an adequate quality is relatively new, most desirable content for sampling falls under copyright protection. If one wants to sample, one is susceptible to licensing fees and the costs of clearing among other legal issues. However, ownership, musical originality, and the eternity of highly regarded classics are nowadays contested. Nothing is immune and everything can be cut up and re-used which has spawned something that Lawrence Lessig calls a Remix Culture. (Lessig, 2008)

Lessig (2008) argues that as opposed to a read-only culture - where businesses decide what, how and when consumers consume - we now live in a read & write culture, which means that we are not only the consumers of meaning but also the producers of it. The difference between producer and consumer has become unclear through advancements and democratization of technology. Lessig is one of many who argue that legislation has fallen behind the technological progress. The new read & write culture would require more lenient forms of intellectual ownership to accommodate for the advances in technology and the genesis of social networking (Lessig, 2008). Since the use of samplers requires that a digital copy of the material used is transferred to the memory of the sampler, sampling can be seen, according to copyright law, as copying. Copyright law in general prohibits copying without the consent of the copyright owner, though not for private use. But music is to be shared among friends and extended family. Since copying is an essential part of digital technology, proponents of more lenient legislation argue that copying should be allowed in a greater extent than what it is currently. (Kusek and Leonhard, 2005).

"In our view, today's copyright law does not differentiate sufficiently between distributing a literal copy of someone else's work, and building on the work of others to create a new work based in part on what had come before" (Kusek and Leonhard, 2005, p.48).

Furthermore, file sharing has increased the amount of music available (YLE, 2010). One can only guess how exactly file sharing has affected sampling. Anyhow, most songs made in the sampling music scene are rarely cleared or licensed in fear of the music not being published at all. Prosecution is a major factor for many sampling artists (Franzen and McLeod, 2009). Even artists who sampled songs and published albums as long ago as 1986 and 1989 are liable to be sued, a recent example of this is the Beastie Boys (a prominent Hip Hop group), who have recently faced legal charges from Tuf America, who has recently acquired ownership of the sampled songs used on the records (Strong and Nolan 2012).

Settling matters in court requires capital that smaller record labels and lesser known artists do not have. The risk of making music by using samples becomes too high. Since there are no guarantees that all the right holders will accept the usage of their intellectual property and not sue anyway invoking their moral rights - even if clearance is established - most producers will strive to avoid sampling altogether.

High clearance costs have led to a situation where artists under big record labels have far better chances of creating sample-based music. The declining amount of samples in new songs proves that artists outside big labels do not have sufficient capital to clear rights as much as they would like to (Heller, 2008). According to the leading artists and producers such as Beck, the RZA and El-p, the decline of sampling can be attributed to the rising clearance costs (Franzen & McLeod, 2009).

IFPI (2012), and the Copyright Information and Antipiracy Centre in Finland (2006) have argued that copyright is needed to protect artists' works. My experience is that copyright stifles creativity. In this study, I will challenge the traditional view that sampled works are copied works. I will scrutinize the Finnish Copyright Act and try to find alternate interpretations in whether or not copying applies to sampling. I will also study the limitations and exceptions to the copyright. The biggest challenge will be to argue why sampling does not fall under the definition of copying.

1.1 Research and delimitations

The objective of my study is to evaluate the problems regarding sampling. More specifically the main objective is to analyze the relationship between sample-based music and copyright law and try to find means and arguments for how sampling artists can continue to publish sample-based works in the future. Creative Commons licenses or equivalent will not be featured in this paper because copyright legislation should be functional in itself. The existence of Creative Commons in my view implies that the copyright law does not necessarily cater to all needs.

A great many records are published every year that use sampling as the key musical ingredient. It is fairly common that many samples are not cleared, because they have been processed to oblivion using effects and chopped to small bits beyond recognition. Therefore, samples are seldom disclosed because it would most likely lead to litigation and being sued (Franzen and Mcleod, 2009).

I will limit myself to Finnish copyright law and will be using the English translation of the Finnish Copyright Act published in the web pages of World Intellectual Property Organization WIPO (Copyright Act [Act No. 404 of July 8, 1961, as amended up to April 30, 2010]). In my view taking the viewpoint of a sampling artist regarding copyright is a novel approach as it is almost non-existent in existing academic literature. Most literature is written from a perspective of lawyers and owners of a large catalog of material. The literature featured in my study almost always warns against sampling. The perspective of lawyers and copyright owners is limited since it does not account for the advances in music technology nor the nature of digital technology. Also the point of view from someone who actually uses digital music technology as a form of expression seems to be absent as well. I hope that my study will be a welcomed addition to the debate with regard to the current developments of copyright nationally and internationally.

1.2 Research Strategy

On the basis of a literature study and the analysis of the Finnish Copyright Act, I will make eleven proposals in regard to the lawfulness and unlawfulness of sampling as a music creation method. I will further analyze these proposals in the context of my own record project. The production is a mix tape -style piece of music running for 40 minutes. It features 10 complete songs and many shorter demos beat-matched to produce a continuous flow of music. The aim of this production is to shed light on what can be done by using sampling.

My aim is to find arguments that could be used to support the lawfulness of my recording as well as arguments that could create a hindrance should I want to publish my record. The information gathered here helps me to prepare myself for the possible future challenges that I might face should the record be published.

1.3 Theoretical Approach

As mentioned earlier, my theoretical framework comprises the Finnish Copyright Act as well as academic and popular literature, news blogs, online newspapers, homepages of copyright organizations and artists, online encyclopedias, and documentary films. *The Future of Music* (2004) by David Kusek and Gerd Leonhard, *Music: The Business* (2008) by Ann Harrison, *Remix Culture* (2008) by Lawrence Lessig, and *That's the Joint* (2004) by Murray Forman and Mark Anthony Neal form the core of the literature in my thesis.

The music producer's point of view is outlined by quotes from Rick Snoman's *Dance Music Manual* (2009), as well as older examples from Martin Russ's *Sound Synthesis and Sampling* (2004). I chose Mike Collins' *A professional Guide to Audio Plug-ins and Virtual Instruments* (2003) to provide basic knowledge about digital audio instruments and tools. *Capturing Sound* (2004) by Mark Katz has also been of tremendous personal value. It has helped me in defining sampling in this paper.

The central message of Kusek and Leonhard (2005), Lessig (2008) and Forman and Neil (2004) is that copyright law has problems and hence it is not suited for the digital age. To balance the view I have selected Ann Harrison (2008), who in many cases calls sampling plagiarism, and "...always deliberate act" (p. 270). The wording suggests condemnation from the part of Harrison, who is a lawyer and has work experience in the recording industry. Also texts from IFPI.org (2012) and the Copyright Information and Antipiracy Centre in Finland (2006) are featured to provide a more balanced view to the study. The one thing all my literary sources have in common is that sampling has a chapter of its own or an addendum, which warn about legal problems should one choose to use sampling.

Other sources are Wikipedia articles on musical appropriation, homepages of artists known to have sampled songs as well as discographies and chart history. The list of known electronic genres is ever increasing and changing. Wikipedia gives an allusion as to how extensively sampling is used. The most significant non-literary source in my study is the film "Copyright Criminals", by Benjamin Franzen and Kembrew McLeod (2009). The film features interviews of artists who make sample-based music, as well as lawyers and administrative personnel of smaller record companies. The film even goes down to show the history of sampling and gives examples of sample-usage through the years.

1.4 Structure of the Report

This study continues hereafter with an analysis of the literature, documentaries and the Finnish Copyright Act. In chapter 3, I will present my record project and evaluate whether, on the basis of the proposals generated in the course of the study, my record can be published without clearing rights with original right holders. I will conclude the study with a discussion about the consequences of copyright to sample-based music making.

2 SAMPLING AS A TECHNOLOGY AND TECHNIQUE

2.1 What Is Sampling?

“... on the simplest level sampling works like a jigsaw puzzle: a sound is cut up into pieces and then put back together to form a digitized ‘picture’ of that sound” (Katz, 2004, p.138).

A sample is a piece of audio material, music or other recorded sound, that is cut up and re-used in a new musical context. A sample can raise feelings of nostalgia and a sense of recognition even if the listener has never heard that particular piece of music before. Sampling relies on existing material and the crate-digging esthetic requires the material to be somewhat unknown. Obscure and old material is cherished by those who sample it and therefore sampling usually refers to a time past, creating an effect of recognition and nostalgia.

2.2 Why Should One Sample?

"Rick James' biggest record was MC Hammer"

-Tom Silverman, CEO, Tommy Boy (in Franzen and McLeod, 2009)

I chose the quote above to exemplify a case where the sampled song became more famous and recognized than the original. Rick James might now be known through the Dave Chapelle show, but when the song “Superfreak” starts playing, people expect “hammer time” referring to rap artist MC Hammer’s song “U Can’t Touch This”, which has become a classic in recent years. Sampling is often confused with remixing or covering. Sampling is a versatile technique that can be used creatively. It gives a new dimension to an old song by creating a new context for it. The postmodern aspect of breaking down established cultural works is also compelling.

The emergence of sampling technology in the early 1980's spawned a number of new musical genres. Wikipedia (List of electronic music genres, 2012) lists 251 different genres of electronic music. Among these genres are hip hop, house and different types of dance and electronic music. Songs that nobody has heard before have risen from obscurity through sampling.

For example, the drum solo in the song “Amen Brother!” by The Winstons is a fundamental part of hip hop and electronic genres like Jungle. It is so widely used that it has its own sampling database online (Amenbreakdb.com, 2012). One could say that without the Amen-break, jungle, breakbeat and their respective subgenres would never have existed.

“Indeed, an entire culture arose from a 1969 break as samplers became more experimental and artists began cutting and rearranging the loop to produce new rhythms” (Snoman, 2009, p. xiv).

Sampling has been used in many top-selling singles and has a distinct esthetic. The AKAI MPC family of samplers is particularly popular in hip hop production due to the sound and distinct effects on sound quality. It was also one of the first consumer-priced samplers and essential in making sampling a mainstream phenomenon. It is still widely used today and the original MPC60 is still used around the world.

Music is a part of the cultural heritage of humanity. Digital technology has also created the possibility for us to give new context to established works by alteration, chopping, pitching and combining different sounds to new wholes. As these new wholes do not resemble the original works, and they rarely compete in the same genre or market, they should be deemed new independent works that command their own copyright.

Sampling changes sound quality in many ways (Russ, 2004). The process of making audio material accessible for digital processing and editing is AD (analog-to-digital) conversion, while playback requires DA (digital-to-analog) conversion. For example, the AKAI MPC sampler originally used 16-bit AD and DA converters, but it also used a nonlinear compression method to drive the bitrate down to 12bit (Linn, 1989).

Although the conversion was cutting edge back then it has a degrading effect on sound quality. Due to memory limitations, the absence of modern codecs and audio compression methods and the lesser computing power, lower sample rates than 44.1 kHz (= CD standard) were preferred in order to fit more samples into the memory of the sampler. The MPC60 used a bit rate of 40 kHz (ibid.).

The central factors that influence digital sound quality are bit rate and sampling rate (Russ, 2004). *Bitrate* is the density of steps in which a sound is stored to a digital form. Lower bitrate means steeper steps which correlates with more audible distortion. *Bitrate* dictates the dynamic range and as the steps get steeper reverb tails and nuances are cut off.

Sample rate describes the bandwidth of the sound. As the bandwidth decreases beyond 44.1 kHz, audible losses in the extremes of the sound spectrum start to take place. Digital filters are used to lower the sample rate and to narrow down the bandwidth. The artifacts of these high and low pass filters are highly desirable in many genres of electronic music. Uneven arbitrary sample rates produce interesting effects to the upper and lower edges of the sound.

Figure 1: How different bitrates affect sound (AbsoluteDestiny, 2002, p. 1)

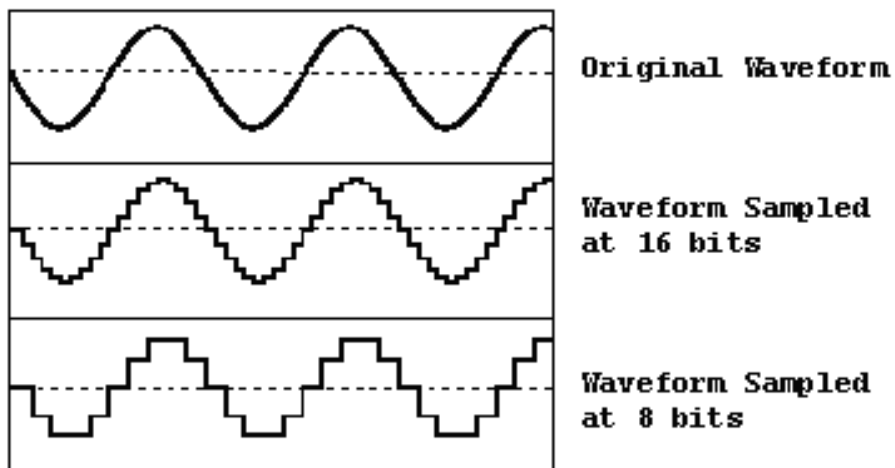
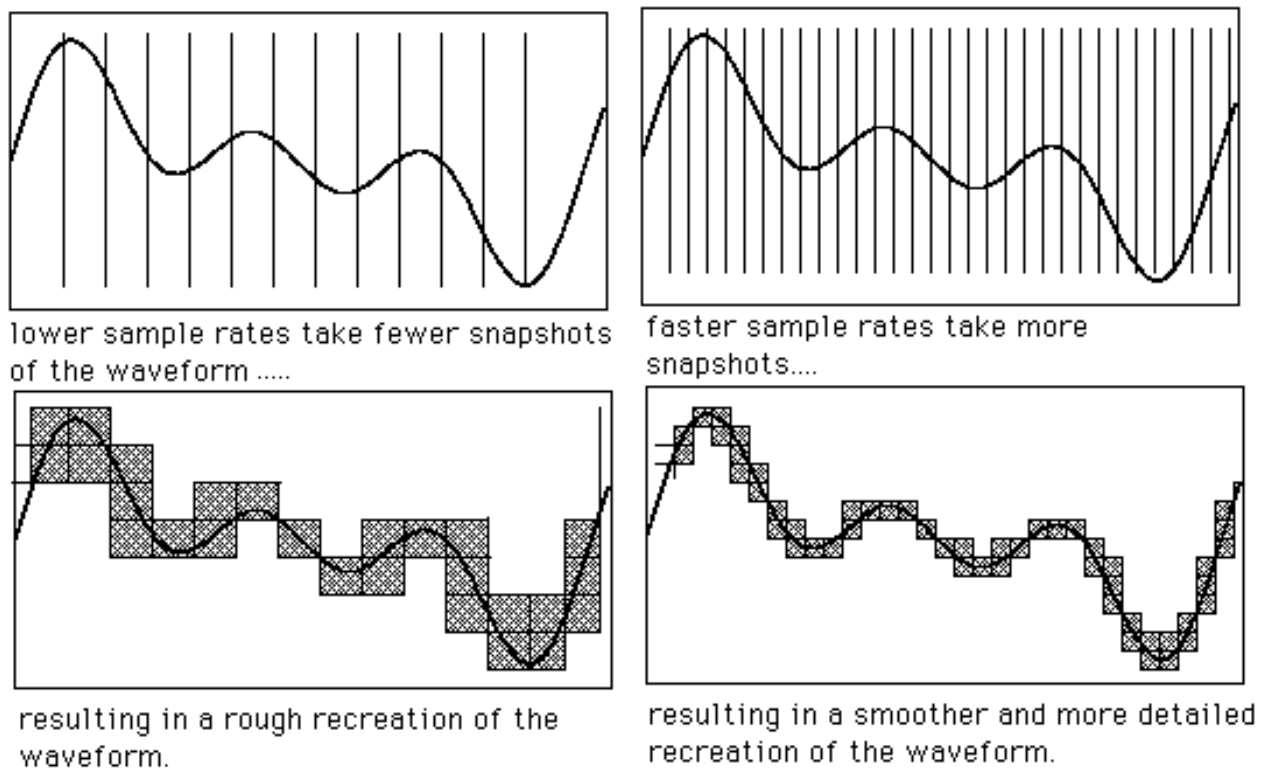


Figure 2: How sample rate affects sound (AbsoluteDestiny, 2002. p.1)



Lowered sample rate and bitrate produce audible degradation (Russ, 2004). It is possible with modern samplers to perfectly reproduce a recorded sound as well. The quality of sound is also a matter of artistic preference and choice (ibid.). The effect that the lower bit and sampling rates create is nowadays emulated by using so-called bit crusher plugins. Plugins are DSP (Digital Signal Processors) software or "...software applications that 'plug in' to their host software" (Collins, 2003, p. 1). The bit-crusher (or even known as Lo-fi) plugin is essentially a distortion effect that lowers bit and *sample rate* to emulate older samplers (Collins, 2003).

By combining the bit-crusher modified sounds with the rasping sounds (or the equivalent) of vinyl players and low-fidelity inputs of DJ mixers driven to distortion creates a gritty and distinct sound. Since the early-generation samplers rarely had a digital output the sound had to go through a 12-bit conversion to analog yet another time, further affecting sound.

The buildup of quantization noise, distortion and seemingly unwanted sounds are the charm of samplers including the background noise from the initial recordings. Some genres of electronic music rely on the degradation of sound quality (Snoman, 2009). Some bands even pressed their own recordings to vinyl before sampling them with the aim to create an effect of something being sampled (Franzen and McLeod, 2009).

My method of music production uses the DAW (Digital Audio Workstation) to cut and edit samples. Basically, I am using the timeline of the Digital Audio Workstation to make edits and align them on a rhythmically divided grid to create rhythms and melodies. Samples usually go through degradation of sample rate and bitrate even in modern systems, not by necessity but by artistic choice. The degraded sound is so established that producers actually prefer older samplers to newer pristine ones because of it, and it is actually expected by the audience when it comes to most genres.

2.3 Sampling as a Musical Element

Since sampling is a tool with which an existing work is used to make new art, it could be called musical appropriation. *"In music, appropriation is the use of borrowed elements (aspects or techniques) in the creation of a new piece"* (Wikipedia – Appropriation, 2009). Appropriation is a form of art usually only associated with visual arts but it can be applied to music as well. Sampling can also be called digital appropriation (McKenna, 2000).

Sampling can play with the effects of exploitation, humor and kitsch. The distinct sound that comes from sampling old vinyl records is also very sought after. Cutting and pasting sound bites makes it quite obvious that the sound is not in its original context, and it creates interesting associations. My favorite example of this is "Frontier Psychiatrist", by the Avalanches, which plays on old movies and stitches up phrases from westerns with psychological statements like *"you are crazy in the coconut"* and *"that boy needs therapy"*, and a horse neigh. It also couples old music from the likes of composer Maurice Jarre in the movie "Lawrence of Arabia" with the drums from a Harvey Mandel and Flip Wilson record among others.

However, sampling may also have a negative effect on listeners. It may lead to accusations of plagiarism, exploitation and disrespect of the sampled artist. The risk of something sounding recycled and "old" in the negative sense is also prevalent. (Cratekings.com, 2006) When hip hop emerged into public attention it was revolutionary because of *"the use samplers to create new sounds instead of the correcting a note in the song and emulate real instruments"* (Thornton, 1996, p.73). It proved that an established piece of art could be broken down and put in a new context.

It is fairly common that original composers and artists are worried that the original song will only be associated with the new artist. Many argue that the creativity of original music makers is exploited. James Mtume (in Forman and Neal, 2004) argued in an interview in 1988 that producers of sample-based music tend to be ignorant of musical theory or musicianship and that using samples only creates short-lived and lazy music in addition to eradicating the art of musical composition.

People like James Mtume rarely consider a producer of sample-based music a musician. Forms of music that utilize sampling are often regarded as lesser than serious music, even lesser than pop music (Forman and Neal, 2004). Steve Albini (in Franzen and McLeod, 2009), a well-known producer, has likened sampling to a bad dance move that is in no way comparable to other instruments or production methods. The attitudes I have come across are equally negative.

An argument against dumbing down musicianship by sampling is crate digging. Crate digging is the act of searching through crates and crates of vinyl records, trying to find the most obscure and interesting sounds possible. As a logical consequence most producers of sample-based music own a lot of vinyl (Snoman, 2009). In my case I have become somewhat of an expert in South American contemporary music.

Sampling is nowadays used in virtually every musical genre. All metal drummers play like metronomes on records, a song sounds like it was made in 1960 - 1980, Astor Piazzolla plays accordion on French hip hop beats (Gotan Project) etc. There are even styles of music that is made solely on sampled sound bites.

Sampling the music of others to make new music has always been a controversial topic even if sampling is fairly common and it has been used in making music since the early 1980's. Despite their controversial status, samples are a powerful means of making popular music. For instance, rapper and music producer Sean "Puffy" Combs practically ruled the singles charts of the late 1990's in the United States and Great Britain. He produced beats that sampled songs of Sting, Diana Ross, David Bowie, James Mtume and The Treacherous Three. Apart from himself, Combs produced hits for artists like Mariah Carey and Biggie Smalls (Wikipedia – Sean Combs Discography, 2012).

Other examples include Doctor Dre, who has used samples from Parliament Funkadelic and Zapp n' Roger to produce Snoop Dogg and other artists. More recent examples are Madonna, who sampled ABBA's "Gimme Gimme Gimme" for the single "Hung up", and the house remakes of songs of Michael Jackson and other artists. (Whosampled.com - Puff Daddy, Mariah Carey, Madonna, Dr. Dre, 2010)

However, some parties welcome sampling. For instance, Brazil's Minister of Culture, Gilberto Gil, a musician and celebrity himself, has a very positive view towards sampling, unlike most of his peers. An entire culture of music in the favelas, the slums, called Funk Carioca (also "Baile Funk") has emerged employing many less fortunate individuals keeping them out of crime and harms way. The government encourages Funk Carioca despite the fact that it builds on taking American pop songs and remaking them into an indigenous form of Brazilian techno. Sampling in Brazil has a unique situation, since the government has chosen to ignore many international IPR conventions and treaties in hope of getting out of its enduring economic misery (Gaylor, 2008).

2.4 Sampling Techniques

2.4.1 Chopping/Slicing

Chopping is basically about editing a sample into rhythm-based segments and triggering them over in a slower/faster beat than originally intended. Another term is slicing. Chopping, sometimes called slicing, is used extensively in hip hop and it is a basic method for the usage of samples (Snoman, 2009). Even when complete loops are used slicing can be used to make a sample fit into a preferred rhythm.

2.4.2 Granular synthesis

Granular synthesis is what happens when a sound is sliced into miniscule pieces that are repeated, modulated or phased to create a pad or a texture (Wikipedia - Granular Synthesis, 2012). Granular synthesis is also what happens to samples when applying time stretching extending the original sound until digital artifacts start to show (Russ, 2004).

2.4.3 Triggering

Triggering is essentially converting audio to midi, allowing a real instrument like a drum to trigger an electric equivalent or anything one might desire (Russ, 2004). Triggering is used mostly in rock and pop, one of the more popular pieces of software being Easydrummer. The fore mentioned software has basically eliminated the need for drum rooms in the modern studio. It reads the waveforms of a recorded drum set and replaces or doubles them according to the producer's taste. Triggering in non-electronic music genres like metal is mostly used to double existing tracks and augment them (Russ, 2004).

2.4.4 Virtual Instruments

“The term ‘virtual instruments’ applies to any software that acts as a musical instrument of some type” (Collins, 2003, p. 35). Virtual instruments are essentially plugin

samplers that are specifically made to mimic instruments and even complete orchestras. Software samplers can quite accurately emulate a multitude of instruments, since the sounds are actually recordings of these instruments. Virtual instruments are completely comparable to their real world counterparts as they are literally based on them, by using libraries in excess of tens of gigabytes, and made by audio professionals. (Snoman, 2009)

2.4.5 Looping

Libraries of premade and licensed loops are used for productions that have short deadlines. Good examples are radio programs and television series. Loops can be made from samples. For example, a drum part with rides can be looped and put on the chorus for extra lift. (Snoman, 2009)

2.5 Sampling Tools

The most relevant methods and tools are pitch shifting and time stretching, which have become inseparable nowadays. I personally use both in concordance, for example to pitch up a guitar riff an octave higher or lower to generate harmonics, or to change a single chord in a loop without affecting the tempo. Another common trick is to generate a chorus for the vocalist by using octave overtones or a completely artificial harmony (Snoman, 2009).

In addition to these two basic tricks, there are plenty of tools available to the modern computer musician, among which but not limited to, are envelopes, LFO's (Low Frequency Oscillator), modulation types (chorus, ensemble, doubler), filter types (formant filters, cutoff - and resonant filters), side chain, triggered effects, distortions, echoes, delays, reverbs, distortions (overdrive, down sampling, clipping) etc. Essentially anything that can be done by subtractive synthesis is possible by using samples since subtractive synthesis can be applied to any sound source.

It is also possible to intertwine and compile all these methods. For example, I can make a virtual instrument of a loop that has been made into something like a synthesizer pad through granular synthesis and a formant filter layered on top a synth that triggers each bass drum.

The problem with sampling and copyright law seems to have little to do with creative possibilities, but more to do with the fact that someone owns the piece of audio necessary to capitalize on these possibilities.

3 SAMPLING IN LIGHT OF COPYRIGHT

The Finnish copyright law doesn't recognize sampling nor mention it. However, sampling is regarded as an exclusive right of the author. I will discuss the most relevant sections of the Finnish Copyright Act in regard to sampling in order to find out to what extent sampling can be considered an exclusive right of the author and whether there are exceptions to the author's rights that would permit sampling without the consent of the author.

“Is sampling illegal? Yes, contrary to popular belief and practice, sampling of an original copyrighted song without permission by the right holder is illegal”

(Smartt, 2011, p. 365)

Smartt also argues that sampling violates two legal rights, the copyright of the song and the sound recording (Smartt, 2011). Hence, as a sampling artist I need a permission to use snippets from a song from the original composer as well as the owner of the recording (master tape), which usually is a record label. The handicap of this practice is that composers and record labels can refuse my request to re-use their songs and therefore block my creative process on legal grounds. However, they are given the right to do so by the copyright law. Should the composers license their songs for me to re-use, I would be obligated to pay a licensing fee. Consequently, existing copyrights restrict creativity and the emergence of new works by the means of sampling.

The possibility of generating novel music through sampling is not recognized in Finnish copyright legislation. Sampling is for all intents and purposes absent in the legislative vocabulary. It seems that the legislators have either not known about the existence of sampling or they have decided that it equals copying. In what follows, I will formulate eleven proposals on the basis of the breakdown of the Finnish Copyright Act. These proposals will correlate with the appropriate sections of the Copyright Act.

3.1 Breakdown of the Finnish Copyright Act

The Finnish Copyright Act is divided into chapters as follows:

Chapter 1 – Subject matter and scope of copyright

Chapter 2 – Limitations to author's exclusive rights

Chapter 2a – Compensation for the reproduction of a work for private use

Chapter 2b – Remuneration from resale of copyrighted works

Chapter 3 – Transfer of copyright

Chapter 4 – Term of copyright

Chapter 5 – Rights related to copyright

Chapter 5a – Technological measures and electronic right management information

Chapter 6 – Special provisions

Chapter 7 – Penal sanctions and liability

Chapter 8 – Applicability of the act in question

(WIPO, Finnish Copyright Act 404/1961 as amended up to 307/2010)

The most relevant chapters in my thesis are chapters 1 and 2. Chapter 4 is important since the term of copyright is almost always an issue when it comes to sampling. Chapter 5 is very important since it outlines the rights copyright entails for phonogram producers (i.e. record labels) and performing artists. Chapter 5a touches upon the technical aspects of sampling as it prohibits circumvention of technological measures. Circumvention is sometimes required when sampling is used. Chapters 2a, 2b, 3, 6 and 8 are

mostly irrelevant. Chapter 7 becomes relevant only if I am to be sued for sampling as it outlines the sanctions for copyright violations.

3.1.1 Term of Copyright

The author's copyright is valid until 70 years have passed from the year of the last surviving author's passing away (1995/1654, s 43). One must also take into consideration the rights of the phonogram producer when it comes to sampling since recordings are the raw material of sampling. The term of copyright of phonogram users is 50 years from the year when the recording was made (2005/821, s 46[1]) or 50 years from the year of publishing the recording for the first time (2005/821, s 46[2]).

The term of copyright of performing artists is 50 years after the performance took place (2005/821, s 45[2]). The artist's economic rights are seldom an issue when it comes to sampling, because the phonogram producer usually acquires the rights with a contract thus not excluding the possibility that a solo instrument could be sampled from a song that incorporates a part with a single instrument. Moral rights might be a factor here, and consent has to be acquired from the musician playing the part, especially if it is recognizable enough.

The long-term protection is quite crippling when it comes to making music out of existing material. The composers, who died 70 years ago, were not around for the technology required to record high-class recordings. The magnetic tape was the first recording medium to achieve an acceptable quality in sound and it was introduced first in the 1930's. It would be another 10 to 20 years before the quality of this technology would be up to the task of faithfully reproducing sound. (Wikipedia - Magnetic Tape Sound Recording, 2012)

1940 – 1960 makes to something around 50 years to the present date, which coincidentally is exactly the period mentioned in the artist's and phonogram producer's copyright protection. Essentially sampling artists are only allowed to use very old material; so old it probably does not even exist in the variety or quality required to produce works that sound good.

3.1.2 Subject Matter and Scope

A person who has created a literary or artistic work shall have copyright therein, whether it be a fictional or descriptive representation in writing or speech, a musical or dramatic work, a cinematographic work, a photographic work or other work of fine art, a product of architecture, artistic handicraft, industrial art, or expressed in some manner. (1995/446, s 1[1])

According to Finnish copyright law, a musical work is subject to copyright protection. The only loophole a sampling artist might use to validate the use of samples is to argue that the works he is using as raw material are indeed not works according to copyright law as they aren't original or independent enough to be copyrightable works. Most of the songs I have used in my project are indeed songs that use some form of sampling. How can songs made with samples be made if what sampled is appropriated and borrowed?

Arguing that something is not original enough to command copyright might be difficult in practice since the threshold is low for a work to be recognized as an original. A piece of music will be deemed a work protected by copyright if it is independent and original enough (Wikipedia – threshold of originality). The quality of the work is irrelevant for the work to command its own copyright (Korpela, Jukka 2012). In addition, subject matter protection might not apply to all works.

Based on the previous discussion a following proposal can be made:

Proposal 1: A sampling artist is not liable for copyright infringement if the original work lacks subject matter protection.

Copyright grants authors economic and moral rights. According to section 2 paragraph 1 the author has the exclusive right to control the reproduction and publishing of his work; “[...] copyright shall provide exclusive right to control a work by reproducing it and by making it available to the public [...]” (2005/821).

Section 2, paragraph 2 of the Finnish Copyright Act states:

“The reproduction of a work shall comprise making copies of the work in whole or in part, directly or indirectly, temporarily or permanently and by any means or in any form whatsoever. The reproduction of a work shall also comprise the transfer of the work on to another device, by which it can be reproduced or communicated.”

Section 2, paragraph 2 defines what reproduction means, and in practice the paragraph defines reproduction as copying. Since the author has the right to control reproduction, and as sampling is dependent on making a digital copy, sampling is prohibited without the permission of the right owner. Sampling might constitute “...any means and in any form whatsoever”.

Section 2, paragraph 3 defines “making available” as any form of communication that grants public access to the work. This includes public performances, public display, and offering to sell, lend or otherwise distribute. Section 2, paragraph 4 adds that a performance or communication to a large enough closed circle also accounts for making a work available to the public. (2005/821)

From the viewpoint of a sampling artist, reproduction happens already when the material is copied to the memory of a sampler. Indeed, in case law sampling has often been defined as copying. Because sampling is not defined in copyright law, the definition of sampling as copying is a consequence of interpretations of judges and juries. It is surprising that even if sampling is a decades old technique, sampling does not appear at all in the Finnish copyright law. In addition, copyright law does not recognize sampling as such nor does it define how long a sample must be to constitute “in part” as stated in section 2, paragraph 2. It seems unreasonable that a snippet lasting for half a second taken from a four-minute song would constitute “in part”. It would be the same as arguing that the word “and” in a four-page essay can be copyrighted.

However, if the sample has been used creatively, to the point that it becomes indistinguishable, one could argue that the original work has no relevance to the new work. If this argument is deemed invalid, the publication of a work using samples means it qualifies as reproduction in the sense that the original work has been communicated and distributed to the public.

Taking into consideration section 12, paragraph 1; *“Anyone may make single copies for his private use of a work that has been made public. The copies thus made may not be used for other purposes”*, it can be argued that no infringement takes place before a sampling artist publishes his work, as copies made to the sampler’s memory during the composing process can be interpreted as private copying. However, 12(1) continues stating that copies made for private use cannot “be used for other purposes”. Using a snippet of a song for the purpose of composing could be interpreted as “other purpose”.

A private person may make a copy of a work for private use according to section 12 (1). Composing new music on the basis of existing works is not listed as prohibited as such, and in my opinion it could fall under 12(1).

Proposal 2: Using sampling as a composing method is private copying and hence legal.

Section 3 defines authors' moral rights. These rights comprise primarily the right of paternity (2005/821, 3[1]) and the right of integrity (2005/821, 3[2]). Section 3(1) states the following: "*when copies of a work are made or when the work is made available to the public in whole or in part, the name of the author shall be stated in a manner required by proper usage*". 3(2) states: "*A work may not be altered in a manner which is prejudicial to the author's literary or artistic reputation, or to his individuality; nor may it be made available in the public in such a form as to prejudice the author in the manner stated*".

Since sampling is essentially "*an art of transformation*" (Katz, 2004, p. 156) the author has the power to decide how his work is going to be transformed or be transformed at all. If the transformation is extreme enough, one can argue that the author cannot have a say in the matter, since the new work neither reminds of nor uses parts of the original. Sampling is not limited to just using parts as they are. Reversing the sound, pitching sound up and down, as well as using filters and envelopes are just few examples of how snippets from original works can be used to create new sounds and effects. Considering how versatile sampling can be it might be that the usage of the original work is not "*prejudicial to the author's literary or artistic reputation, or to his individuality*" and thus making 3(2) irrelevant in terms of sampling.

Proposal 3: Sampling doesn't violate authors' moral rights as paternity rights can be respected by mentioning the name of the original author in the publication. The integrity of the author or the work is not at risk as most often the original work cannot be recognized due to excessive sound processing.

However the moral rights still have to be taken into consideration, and it might suffice just to state the authors of the works sampled in the publication to respect Section 3 (1). Section 4 of the Finnish Copyright Act discusses derivative works and adaptations. It reads:

A person who translates or adapts a work or converts it into some other literary or artistic form shall have copyright in the new form, but shall not have the right to control it in a manner which infringes the copyright in the original work (2005/821, 4[1]).

If a person in free connection with a work, has created a new and independent work, his copyright shall not be subject to the right in the original work. (2005/821, 4[2])

What is the difference between derivative works and adaptations? Derivative works are based on other original works. Derivatives can thus be seen as new versions of already existing works. Adaptations might be just a new arrangement or a remix that turns a country song into a rock song.

In my view, sampled works can be either adaptations or derivatives, and I see this as a matter of artistic choice. Snippets and short samples tend to fit better in the adaptation category, while longer and recognizable re-used parts fall into derivatives.

Original and copied are mutually exclusive definitions. How can a work that is made using bits of other songs be original? A sample-based work might be perceived as an original work, because a great deal of creativity, effort and time has gone into making it. If snippets should be used, it would be best to avoid the use of “substantial parts”, as interpreted by courts. A substantial part is a “qualitatively significant part of a work even where this is not a large part of the work”. (IPO, 2009)

The consent of the original author is required to sample a work unless it is done in free connection as stated in 4(2). “In free connection” means that the work might be similar, but if it has been done without knowledge of an existing work, the consent of the author is not required. This argument cannot be applied to sampling because sampling requires one to use the original in the creative process.

Proposal 4: Composing sample-based music in free connection is not possible since the author knows that he uses existing music.

“...two people might independently produce identical images at different times, and both would meet the originality requirement. In this sense “original” means not copied.” (Merryman, Elsen and Urice, 2007, p. 507)

The quote above hints that if a new sample-based work is “original enough” it could command its own copyright. A question that comes to mind is that if a new song is deemed to be a new and original song in such a way that it commands its own copyright, is the fact irrelevant that it uses samples?

It seems that sampling does not exclusively fall into the category of derivative works or adaptations. Sampling can be used to create derivative works. However, what if the song and composition differs completely from the original? What if a bass guitar from

a ballad has been chopped up, pitched up, processed through a wah-wah filter and converted into sounding like a rhythm guitar for an up-tempo and funky electro track? Is it still a derivative, if the sample is not in any way reminiscent of the original and the new work is completely different from the original works?

Since a work can be built up from other works it can still be derivative in the practical sense because audio material of other artists is used even if it is not compositionally nor by sound comparable to the original.

Proposal 5: A song composed by sampling is not an independent work as it is always a derivative work or an adaptation.

3.1.3 Limitations on Copyright

Chapter 2 of the Finnish Copyright Act deals with the “limitations to author’s exclusive rights”. Unfortunately, the limitations to copyright defined in this chapter provide little relief for the sampling artist.

Chapter 2 starts with general provisions stating in section 11 paragraph 2 that the “*author’s name and the source must be indicated to the extent and in a manner required by proper usage*” and that the work may not be altered without the consent of the author more than necessary (2005/821). Section 11(3) allows a copy of a work to be published, if it concedes with the fore mentioned limitations in 11(1) (2). This means that even if there would be an exception in the Copyright Act that would allow a sampling artist to use material from an existing recording and publish his sample-based recording, authors’ moral rights and the right to control the making of derivative works and adaptations must be taken into account.

Section 11a (2005/821) gives some hope for sampling artists since it allows temporary reproduction. However, temporary reproduction is allowed only if:

1. The reproduction is transient or incidental
2. The reproduction is an integral or essential part of the technological process
3. The purpose of reproduction is to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of a work
4. The reproduction has no independent economic significance

It is likely that 11a will be interpreted in courts in the manner that all four criteria have to be met simultaneously. If not, 11a could be applied partly to support the legitimacy of sampling. It could be argued that the process of copying audio material into the memory of a sampler is temporary as it is transient and an integral and essential part of the technological process of composing sample-based music. This of course depends on how “transient” is interpreted? How long can a sample reside in a sampler’s memory? Naturally, this argument cannot be applied if the sampled sound bite is stored in the memory. It is also self-evident that sampling does not comply with the law in regard to “*with the intent not to transmit it further in a network between third parties*”. The sampler is not an intermediary. Section 11a (1) (4) allows for temporary reproduction if it does not have any independent economic significance. If a work that uses samples does not generate any monetary gain, 11a (1) (4) could be used to argue for sampling.

Proposal 6: Sampling is legal on the grounds that making copies is allowed when it is an integral part of the technology

Yet another limitation to copyright that could help sampling artists can be found in section 22. It states: “*A work made public may be quoted, in accordance with proper usage to the extent necessary for the purpose.*” (1995/446

One might argue that sampling equals quoting a work. One of the main issues with sampling is the accusation of plagiarism even if a work in its entirety is not copied. The project done in connection to the thesis only uses small parts, for instance 16th notes and individual drum hits. However, the right to quote always requires that the original source and the author are named.

Proposal 7: Sampling could be perceived as quoting because it is using pieces of existing works.

An additional argument to support the legitimacy of sampling is parody, if it plays on kitsch and humor. For instance, in *Campbell v. Acuff - Rose Music* (510 U.S. 569, 1994) the Supreme Court ruled that parody might be fair use despite of being commercially successful. In this case a rap group named 2 Live Crew sampled Roy Orbison’s “Oh, Pretty Woman” and laid it on an 808-drum beat and called it “Pretty Woman”. The song was about women with aesthetical challenges, hairiness, and baldness etc. sung in the same melody as in the song of Roy Orbison. The judge ruled that this form of use was under fair use, even if economic gain was achieved (Wikipedia – *Campbell v. Acuff-Rose Music Inc.*).

In Finland, copyright law does not limit copyright to allow parody (Hietanen, 2009). However, Finnish law allows the making of derivative works and adaptations and grants copyright to "*new and independent works*" (2005/821, s 4). There is also the EU Copyright Directive (2001/29/EC) that in article 5(3)(k) recognizes parody as a copyright limitation. Finland has opted not to incorporate article 5(3)(k) to its legislation (Hietanen, 2009). Nevertheless, due to the extant EU copyright legislation, Finnish copyright law does allow parody as long as it does not offend the right holder and he/she consents to the usage of his work. In addition, even though the parody argument could be applied, it is not a strong one, since authors and judges might not share the same type of humor as the creators of the parody.

Proposal 8: A sampling artist cannot rely on parody as a defense since it is unknown in advance what will offend the original author.

3.1.4 Transfer of Copyright

Section 27, paragraph 1 (1993/418) permits the transfer of copyright in entirety or in part with the exception of the moral rights defined in section 3 that cannot be waived. It is possible in theory that the sampling artist could buy the rights to the original work that he wants to sample instead of licensing rights to sample. In practice this almost never happens, probably because licensing lets you sell the same thing (permission to use the work) many times.

However, according to section 28, the sampling artist does not have a permission to transform the work, the rights of which have been transferred to him unless it has been agreed upon with the original author. Thus, the transfer of copyright does not help the sampling artist unless he has also acquired the right to alter the original work.

Proposal 9: Buying copyright to the original work is not a feasible choice for a sampling artist.

3.1.5 Technological Measures and Electronic Rights Management

Section 50a (2005/821) and subsequent paragraphs state that if a work has been protected by technical means by the author or some other person with the author's permission, it is forbidden to circumvent this protection. However, this clause is relevant only in the digital realm, where a perfect copy can be made quickly and easily of a digital recording. The purpose of technical protection is to prohibit copying in this manner.

The first thing that comes to mind is that samplers usually require the sampled material to be recorded into the memory of a sampler and most hardware samplers feature only analog inputs. Basically one only needs to connect the headphone output of a CD player to the sampler's inputs and press play. The transfer should be possible since CD players have a DA (digital to analog) converter that transforms the digital source into an analog line signal and samplers have line inputs with AD conversion to store the sound in digital form, re-recording the signal. Since the protection measures are software solutions this goes around the need of circumvention without breaking any protection measures. The reason why re-recording nearly always works, is that protection measures must allow for playback on consumer products. Since the files are going to be compressed anyway, the miniscule loss of quality of an additional DA and AD cycle is irrelevant, and in the sampling aesthetic it is even a welcome addition.

Proposal 10: Sampling artists are not in danger of infringing on circumvention provisions if they use DA – AD to re-record works.

However, section 50d complicates the issue by declaring that a copy without the original “electronic rights management information” shall not be made. This is further muddled up since a work utilizing samples is not necessarily a digital copy and it might not be published in a digital format as vinyl is rising in popularity.

Proposal 11: Sampling artists are likely to violate the electronic rights management provision due to the fact that the re-recording does not carry the original rights management information.

4 MY PROJECT

My project is a 14-song album, to be released if the legal issues lined out in this paper permit me. The genre I would label these pieces with would be house music that is played in clubs and at parties. I have been using Sony Acid 7 Pro, the predecessor of which, i.e. defunct Sonic Foundry Acid, was listed as a software-sampler (Russ, 2004). Nowadays it is a fully-fledged DAW. (Sonycreativesoftware.com, 2012)

4.1 Rules of Engagement

These rules were set up to hinder me from making any kind of creative compromises resulting from copyright law. The principles that governed my work were the following:

1. Sample anything you can find that suits you
2. Obscure the samples in every way possible
3. Pile as much samples as possible in the same track
4. Never use the same sample twice

With regard to the first rule, if my production was done keeping copyright law in mind, it wouldn't represent the possibilities sampling has to offer. In my opinion it wouldn't make a good example of what a sample-based work could be. Sampling anything, even the newest radio chart hits would make it less probable that I would "get away with it" due to the obscurity of the sampled tracks. I thought of the second rule because I wanted to minimize the risk of the author or right holder being capable of identifying his work as it could lead to prosecution. It would also encourage me to stay as creative as possible in my use of samples thus increasing the possibility of the work attaining its own copyright, which would be a central point of argument. The third rule was to eliminate the possibility of calling the production a rip-off of a certain song. If I piled a lot of music on top of itself, it became more probable that the work would be regarded as novel, and it would also make recognition of individual sounds more difficult.

The fourth and final rule was to ensure a great plethora of samples being used in my work. Quantity would also urge me to be creative in my use of samples, since it requires more skill and labor to make a whole using many small parts. Using as many samples as possible would also make the risk of prosecution higher and hopefully attract a lot of ownership disputes - displaying the problems with copyright and sampling.

In my experience when music is sampled it becomes just raw material akin to a saw tooth oscillator in a synthesizer or the color green in a painting. However this view is not without its problems.

4.2 General Information

All drums have been sampled from other songs. All instruments were chopped up and gathered together in to a new more danceable form. I have sampled electric guitars from folk records, hip hop records, house, experimental music, my friends' music, classical piano music, pop music, metal, 80's dance music... Anything I have had on my hard drive at the time of making.

4.3 Theme and Genre

Since the music is what it is, the names of the songs are tongue in cheek employing a sexist parody theme. The music was meant to be fun and genuinely stupid, using humor as a key element. However, the high production value of these songs and the amount of work I put in them would hopefully make them musically interesting as well as entertaining.

4.4 Technical Specs

All songs had the basic house 4/4 time signature with bass drum on every fourth note. Samples have been distorted, delayed, turned backwards, pitched down, and pitched up, extended, shortened, beat-matched, chopped, low-passed, high-passed, band-passed and

gated. Sometimes they have even been harmonized and automated with resonant filters, as well as been mixed, added reverb and delays to and filled with other effects.

All finished songs have also been mixed and cross-faded together in a mix tape fashion, where a song fades into another. Most songs have been tempo-matched and on some occasions a completely new part has been made in the transition by sampling the songs I have made. The end result was a 40-minute piece of continuous music. In hindsight the songs more or less melted together and some pieces became a new whole.

5 DOES MY PROJECT INFRINGE ON COPYRIGHT?

The discussion of sampling was brought into public discussion in Finland for the first time in 2004 when an artist named Ruudolf published a record in which he mostly recycled old hip hop beats and classic samples. The album probably would not have been traditionally published (Hietaneva, 2004). The difference with my production and that of Ruudolf's is that mine utilizes snippets and short samples as well as intricate processing and modification of the original sounds.

As of now, I have made an album consisting of 14 songs, all chopped up from hundred different songs and records. The question is could I legally publish my project? Not more than a fraction of a second of each sampled original song was used and it makes it difficult and practically impossible for the listener and the original composer to recognize the original songs.

This thesis has been about studying copyright law and how it views sampling. A goal set in the beginning of this thesis was to examine if my songs can be viewed as original works or merely derivative works? Am I liable for copyright infringement? Can my work still be labeled as plagiarized in light of copyright law? Examining the proposals lined out in Chapter 3, I must conclude that my project is incompatible with current copyright legislation.

5.1 Proposals and Deconstruction

I will go through my proposals and see how they apply to my project. In connection to Proposal 1, I analyzed section 1 of the Copyright Act and found a way of how sampling could be defended. In Proposal 1 I argued that a sampling artist is not liable for copyright infringement if the original work lacks subject matter protection. Copyright law grants subject matter protection to works if they reach the threshold of originality.

There is a general consensus that music is not what it used to be that it has become more standardized and overproduced, and quality has gone down. This could be taken an advantage of when arguing that some works do not deserve subject matter protection. But as the threshold for a song to be recognized as original is low, the same could be argued about my project. My project might not original enough to command its own copyright since it is based on other composers' works, even more literally than the works I have used.

As a sampling artist it is hypocritical to argue that something else is not original. How can one argue that one's work is original when it uses samples of unoriginal songs? This argument requires an arrogance that might be devastating to my argument politically. Sampling is a technique that is widely used. It is three decades old so there are bound to be others who have sampled exactly the same songs in a similar fashion. If I am able to prove that one song is unoriginal enough and hence doesn't deserve subject matter protection, even though this would be very unlikely, I might not be able to prove it on every song sampled in my project.

In Proposal 2, I am arguing that sampling is private copying and hence legal. Amateur music makers do indeed do their sampling privately and from their home, and in Finland this is more of a norm. Also these days production is done on laptops, which further emphasizes the fact that sampling is a private matter in the production stage.

Even if private use might be legal on the grounds of 12 (1), it is not without risk. As this is the age of social media, one should be careful for to not post (and therefore reproduce) works based on samples on the Internet. Probably the worst thing that could happen to me in regard to liability would be a sample-based song going viral without the consent of the original authors.

The moral rights granted by section 3 of the Copyright Act are by far the most troublesome when it comes to sampling. In my opinion section 3 grants rights and protection that are impossible to fully enforce in the real world. However, these are powerful rights, which allow for little leeway. In my third proposal I suggested that sampling doesn't violate authors' moral rights as long as I mention the name of the original author in my publication. I also proposed that the integrity of the author or the work is not at risk because the original work cannot be recognized due to excessive sound processing.

However, simply mentioning the names of the original author's is not enough. There has to be consent for the use of the work. The original author also has to accept the derivative song, otherwise it would be hard to get consent. Also integrity is a term that is to be settled in court, and a court hearing is something I'd rather avoid.

One could argue that if the threshold for originality is low, why must the integrity of the author be respected at all? If originality is achieved easily and therefore is of low value, why should the integrity of the author be protected so extensively? Especially in the digital age, this does not make any sense because the world has become more of a global village. It is beyond reason that one man's single song that is not that original in the first place, becomes highly protected in an environment full of content. It should suffice just to name the original author on the aforementioned grounds.

My proposal related to composing sample-based music "in free connection" provides a solution to the abundance of content in today's world; essentially it allows a work to command copyright even if it would otherwise be violating copyright. "In free connection" refers to a manner of composing a work that has been done without knowing of another work that is essentially similar enough. Even "in free connection" grants all other forms of music an exception, the sampling artist is not that fortunate.

Sampling started off with vinyl and DJ's, and even if the sampling artist does not know of the music he is sampling, he certainly knows he is using it. Sampling vinyl requires the playback of a record, which should make it self-evident why sampling never happens in free connection.

It seems impossible to argue that a sample-based song could be composed in free connection in any other case than someone has sampled exactly the same song, and done exactly the same processing. Even in this case both originals would not be in free connection to the song sampled, which leads to proposal 5 – the discussion of derivatives and adaptations lined out in section 4:

A song composed by sampling is not an independent work as it is always a derivative work or an adaptation.

Judging by section 4(1) in the Copyright Act my proposal is a solid one. Sampled songs are derivatives with no exception. However, the status of a derivative song is quite redundant in my opinion, since when making a sample-based song many songs are sampled. Is the sample-based song a derivative of all the works sampled, or just some of them, and on what grounds? Taking the questions derivatives raise into consideration, I draw the conclusion that copyright law does not take into consideration what can be done with sampling. Because derivatives are so ill-defined it points out that the legislation has not been written knowing what can be achieved technically. A derivative work can also enjoy copyright protection, but only if it does not infringe the rights of the original author.

I also stated that sampling is legal on the grounds that making copies is allowed when it is an integral part of the technology. In the Copyright Act this proposal refers to section 11 that gives many possibilities to argue why sampling could be deemed legal.

However, section 11a seems to be for the purpose of keeping information technology legal, and not as much for legitimizing music production technology. The reason for the above conclusion is that it allows only for temporary reproduction. The Internet would not function if copying data to memory was prohibited. Proposal 6 takes advantage of this:

Sampling is legal on the grounds that making copies is allowed when it is an integral part of the technology.

Sampling requires audio material to be stored into a memory. Therefore one could argue that section 11a makes sampling legal on the grounds of section 11a (1) (4). However this just makes samplers and using them legal. Basically it comes down to how one is to use sampling and if one violates the original author's moral and economic rights.

Referring to existing music by actually taking a digital copy of it and putting into a new context might pass for quoting in copyright law. Hence I stated that sampling could be perceived as quoting because it essentially uses pieces of existing works. I fail to see why the right of quotation as outlined in section 22 could not be applied to sampling as well. My suspicion is that sampling is not the manner of quotation originally thought of when writing this section. It seems however that the moral and economic rights are more important than the right to quote in this manner.

My eighth proposal argues that a sampling artist cannot rely on parody as a defense since it is unknown in advance if it will offend the original author. As an artist in Finland I cannot opt to argue for parody should it be required since the Finnish does not recognize it. It would be possible to file a complaint to the European Court of Justice about the Finnish Courts not following EU-law in this matter. But my goal is to use

sampling as a technique to make music, not to instigate processes of law. Anyway my project is not of a parodied nature even if some humor is involved in the titling. The parody defense might be applicable to my project if humor counts as parody. But not in the sense that it parodies the songs sampled. It is more a parody of a music genre; house in particular and not in any way a parody of the songs that I have sampled. Because parodies usually trample over moral rights and make fun of the original author or songs in some way and as these rights are more emphasized, parody is not a viable option.

Sampling and the dilemma of moral and economic rights might be solved if one could be able to transfer the copyright as described in Chapter 3. Paying an agreed price with the original author and agreeing upon the use of the sample is how this is usually done. However, moral rights cannot be waived and an agreement has to be made with the author. Hence, in Proposal 9 I suggested that buying copyright of the original work is not a feasible choice for a sampling artist.

The author always retains his moral rights even if the rights to the works would be transferred or licensed. Transferring the rights from multiple owners might be very difficult. The property gridlock described by Michael Heller (2008) describes why this isn't feasible: there are too many owners, and as every party owns veto nothing can come of it. "Too many owners" refers in this case to the fact that there are many right owners to each piece of music and many pieces of music in a sampled song further complicating the issue.

When it comes to sampling, one needs access to music works and audio material. Most material can be found on compact discs and data files. However, compact discs and data files might come with DRM - copy protection software - which might make importing a bit more difficult on computer DAWs and through digital outputs. Recording

the source through an analog output quite easily circumvents the copy protection software.

In proposal 10 I suggest that circumvention of copy protection might be legal, done through DA AD conversion. Sampling artists are in danger of infringing circumvention provisions on the basis of section 50a (1). However since the paragraph in question names that “an effective measure” is not to be circumvented, one could argue that measures of this sort are not effective and therefore possible to legally circumvent. Alas, in relation to the circumvention provision I stated that sampling artists are likely to violate the electronic rights management provision due to the fact that the re-recording does not carry the original rights management information.

This comes down to which section is deemed to carry more weight in court, section 50d or 50a. In my opinion the previous one makes more sense and probably is the more important one in regard to the issue of circumvention.

5.2 Liability

I infringe the moral rights lined out in section 3. I have not asked for the consent of none of authors and I have altered their works without permission. Making available (i.e. publishing), which is lined out in section 2 is pretty much impossible to go around when it comes to sampling. In my opinion music needs to be shared, and it loses its purpose if it is only made in the confines of one’s private home. Music also loses its viability as a source of income to a professional musician if it is not legally publishable. Also a couple hundred Facebook friends would probably constitute a large enough closed circle for infringement, as defined by section 2 (4). It might just be that sampling is unnecessarily risky when it comes to making music.

However, I am not liable on the basis of the following grounds. Section 11a allows for the use of copying if it is an integral part of the technology, and samplers fit this description perfectly. However, moral and economic rights still play a part here, since only the original author has the right to alter his work. The exception to the economic rights is a blanket license that is issued for TV stations and radio stations for a yearly fee by performing rights societies (Songtrust, 2012).

The author has the right to decide about the reproduction, making available in original or altered form according to section 2, and the right to decide over adaptations and derivative works according to section 4. In addition to requiring consent, appropriate crediting has to be maintained. Appropriate crediting is difficult when publications are Mp3 files. Using samples so that the owner of the work does not feel impeded upon even after consenting might also be difficult. How the original author chooses to enforce his rights can have dire consequences on a music production based on samples.

Presumably my project will never be published at all. Only section 14(2) could provide an exception that would allow me to publish my recording as a student for temporary use in educational activities. The smartest decision, in regard to copyright law, would be to delete the files after graduation.

5.3 Final words

Sampling is not a conventional form of art, as it relies heavily on technology and existing music. The creative aspect of sampling is deeply intertwined with technological innovation, as it is as much about utilizing tools as a form of musical artistry. However, on the basis of my breakdown of the Copyright Act in Chapter 3, it seems that copyright law does not accommodate for such art that has been created using digital technology. Nor does the Copyright Act discuss the possibility of creating new original works by combining existing works as is done through sampling.

Why cannot copyright legislation accommodate the same threshold for works that combine other works into a new whole? Does copyright promise too much for right holders? Interestingly, music has become more protected than science in regard to ownership. How is this in anyone's interest? If the standards of science, which arguably have more value to humanity, are too lenient to protect entertainment, what does that tell us about our priorities? In my opinion it speaks of the fact that current copyright laws might be ethically questionable.

There is a need for some kind of a licensing system if sampling is to remain a compositional method. Some kind of a blanket or statutory license with a fixed fee, like those applied to radio stations or public venues granted by performance rights societies, like Teosto in Finland, could be a solution. (McDonald and Heather, 2012)

There is an alternative to using sampling in relation to someone else's work. One can re-record the song and sample it as one pleases. For example, Atmosphere a successful independent rap act has increasingly moved to have musicians replay the songs that the producer has used. These songs are then sampled. However, the reason samples have been replayed is due to the fame and success of Atmosphere, and the increased risks of litigation that has followed. (Gase and Zach, 2011)

In my opinion replaying instruments just puts one more phase into the production and even though it circumvents many problems, all musicians do not have the resources to pay professional musicians to record and reproduce whatever springs into mind. Also, reproduction in this manner requires skillful musicians, an expert who knows current recording techniques and a producer who is proficient in music styles of days past (for example the Motown sound). In my opinion replaying samples is the same as not using any samples at all.

Even in 2012, over 30 years after its inception, sampling is still as controversial as ever. And as two years have passed since I started writing this thesis, new techniques have emerged that are completely alien to me. For example, Izotope Iris is a software synthesizer that uses a visual interface to choose harmonics or parts of a sample to which subtractive synthesis is applied. New software creates entirely new possibilities and challenges. (Hughes, 2012) For example, does copyright apply to the third harmonics (essentially unmusical noise) of a song?

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7 APPENDICES